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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM EARL WILSON,

Defendant and Appellant.

B285594

(Los Angeles County
Super. Ct. No. NA105002)

APPEAL from an order of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Reversed and remanded with directions.

Kelly C. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted William Earl Wilson of voluntary manslaughter for the killing of Jacob Howard. Wilson appeals from the trial court's denial of his motion for a new trial pursuant to Penal Code section 1181.¹ Wilson contends on appeal the trial court erred by denying his motion for a new trial using an incorrect standard because it failed independently to review the evidence. We agree. We reverse the order denying the motion and remand the case with instructions for the trial court to conduct a rehearing. If the trial court grants the motion for a new trial, Wilson will be entitled to a new trial.

Wilson also contends, in a supplemental brief filed after this court decided *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the trial court violated his rights to due process and equal protection by imposing certain fines and assessments absent evidence of his ability to pay them. If the court denies Wilson's motion for a new trial, the court should again pronounce judgment against Wilson and afford him the opportunity to request a hearing and to present evidence demonstrating his inability to pay the applicable fines and assessments.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

The information charged Wilson with murder (§ 187, subd. (a); count 1), voluntary manslaughter (§ 192, subd. (a); count 2), and involuntary manslaughter (§ 192, subd. (b); count 3). The information further alleged as to all counts Wilson

¹ All undesignated statutory references are to the Penal Code.

personally used a deadly or dangerous weapon (a knife) in the commission of the offense (§ 12022, subd. (b)(1)).

Wilson pleaded not guilty and denied the special allegation.

B. *The Evidence at Trial*

1. *The prosecution case*

(a) *The killing of Jacob Howard*

Bunnie McMillian testified to the events of September 19, 2016. Early that morning McMillian was asleep in his one-bedroom apartment, in which he lived with Wilson, Karon Jackson, and Jacob Howard. McMillian and Jackson slept in the bedroom; Wilson slept on the floor in the living room; and Howard slept on a chair in the living room with his feet on an ottoman.

McMillian went to bed around midnight or 12:30 a.m., but woke up around 2:00 a.m. He heard unusual thumping noises. The sounds started and stopped, and after about two to three minutes, McMillian got out of bed to go to the hallway. From the hallway, McMillian saw Wilson on top of Howard in the living room. Wilson was saying to Howard, “What’s going on?”

McMillian walked into the living room and saw Wilson lying “flush” on top of Howard, who was slumped down, facing up, and lying back against the chair. McMillian demonstrated how Howard was positioned by placing his shoulder blades toward the top of the chair, the bottom of his body toward the front of the chair, and lying back at about a 45-degree angle. The ottoman was pushed to the side, away from the chair. Wilson had both of his hands on Howard’s collarbones and was pushing him forward. McMillian could not see Howard’s hands because Howard was “such a small guy.” Neither Wilson nor Howard was

making any noise. McMillian believed Howard was struggling to get up, because “anyone be on top of you that particular way, you should want to get up,” and because he heard Howard’s feet thumping against the floor. This thumping sound was similar to the sound McMillian heard when he first woke up.

McMillian asked Wilson, “What are you doing? What are you doing?” He then grabbed Wilson by the shoulders and attempted to pull him off Howard. Wilson continued to lean forward in an effort to stay on top of Howard. After about five or 10 seconds, McMillian pulled Wilson away, and noticed Howard had blood on his T-shirt and was short of breath. According to McMillian, Wilson said Howard “tried to come at him with a knife.” Wilson and McMillian went outside, and McMillian told Wilson to call the police and paramedics. Wilson called the paramedics, who arrived five to six minutes later.

Long Beach Police Officer Kelsey Myers responded to the scene after learning from dispatch of a stabbing at the location. Wilson was standing on the sidewalk in front of the apartment, and flagged down Officer Myers. He directed her to the apartment, stating “He’s in there.” When Officer Myers asked Wilson where “the person who did the stabbing was,” Wilson looked at her, shook his head, and “kind of looked down at the ground.”

Officers Myers and another police officer walked into the apartment and saw Howard curled up in the fetal position next to the chair. There was a significant amount of blood at the scene, but Officer Myers observed only one laceration below Howard’s collarbone, which was not bleeding. Officer Myers thought Howard must have had more wounds given the amount of blood, but she did not see any. She used a T-shirt from the floor to

press on Howard's chest in an effort to stop any additional bleeding. Long Beach Fire Department paramedics transported Howard to a nearby hospital, where he died. Howard was 72 years old.

Officer Myers observed a large kitchen or steak knife on top of the chair. The knife was between nine and 10 inches long, with an approximately six-inch blade. McMillian had never seen Wilson or Howard with the knife and did not recognize the knife as one from his kitchen.

McMillian testified nothing unusual had happened the prior evening, and Wilson did not seem upset with Howard before they went to bed. McMillian was not aware of Wilson or Howard having a temper, and he had not previously seen Wilson with a knife or other weapon.

(b) The Investigation

At about 11:00 on the morning of the killing, Police Detective Mark Bigel interviewed Wilson at the police station, after advising him of his *Miranda* rights.² The interview was videotaped and lasted about one hour and 50 minutes. The prosecutor played approximately 50 minutes of the interview for the jury. Wilson told Detective Bigel he was asleep on the floor of the apartment when he heard stomping noises. When he rolled over, he saw Howard stomping and pacing back and forth. Howard approached Wilson and tried to stab him with a knife he was holding in his right hand. Wilson was on his knees, but got up onto his feet before Howard could strike him with the knife. Wilson wrestled with Howard and grabbed Howard's right arm

² *Miranda v. Arizona* (1966) 384 U.S. 436, 471.

and right hand, turning the knife toward Howard. Wilson was just “going to hold [the knife]” facing towards Howard to scare him. However, Wilson and Howard both lost their balance and fell over the ottoman and landed in the chair, which is when the knife stabbed Howard. Wilson explained that when he grabbed Howard’s hand, he told him, “[T]his is how you do it.” Wilson did not tell Detective Bigel he was scared during the incident.

Wilson told Detective Bigel he got into an argument with Howard about one week earlier, and in response to something Howard said that upset him, Wilson slapped Howard across the face. Wilson explained he “slapped the shit out of him.” Howard was “out” for 10 or 15 seconds. Howard and Wilson “weren’t cool” and had tension the whole week leading up to Howard’s death.

Deputy Medical Examiner Keng-Chih Su performed an autopsy on Howard. Howard was five feet seven inches tall and weighed approximately 138 pounds. Dr. Su determined the cause of death was a stab wound to Howard’s right upper chest that measured seven-eighths of an inch by one-quarter of an inch, and was two inches deep. The direction of the stab wound was downward and front to back. The wound was fatal because it cut the subclavian artery, which led to rapid blood loss.

There was a “mild angle” to the stab wound that could have been caused by some “twisting” of the knife, but usually occurs because the angle of the knife changes as the victim struggles. The stab wound could have been done without a large force. Howard did not have any other injuries, bruising, broken bones, or torn ligaments. Neither Wilson’s nor Howard’s fingerprints were on the knife. The absence of fingerprints was consistent with Wilson’s explanation that Howard was holding the knife during the entire struggle.

After the People rested, Wilson moved for a judgment of acquittal pursuant to section 1118.1. The trial court denied the motion, stating “I do find there is sufficient evidence to take it to the jury.”

2. *The defense case*

Wilson testified in his own defense. He was awakened at 2:00 a.m. by Howard walking back and forth around the room and mumbling. Wilson’s back was turned towards Howard, but he heard Howard stop about two feet behind him. Wilson turned around and saw Howard holding a knife over his head. Wilson was “completely scared” and believed he needed to defend himself. Howard was holding the knife in his right hand at the height of his waist, with his arm parallel to the ground, but he quickly raised his arm up. Howard swung his arm downward toward Wilson, who was still lying on his side, and Wilson reached up and grabbed Howard’s wrist. Howard then grabbed the knife with his other hand and continued to pull the knife away. Wilson put his left hand over Howard’s hand and got up onto his knees.

Wilson and Howard struggled, “bumping around the room,” with Wilson still on his knees. Howard was pulling Wilson backward, and Wilson was pushing, trying to stand up. Wilson and Howard ran into a table and stopped, at which point the knife was pointed “straight down.” The two were still struggling, and Howard “wouldn’t listen to what [Wilson] said.” “Even though [Wilson] was on [his] knees, [Howard] didn’t have a chance” because Wilson “could have stood up right then and there,” but he did not because he thought Howard “would quit.”

Wilson, who was still on his knees, then turned the knife toward Howard and said, “[T]his is how you do it.” Wilson did this to scare Howard. At this point the edge of the blade was about six or seven inches from Howard’s chest. Howard was still pulling the knife toward himself to get it away from Wilson. Wilson started getting up as Howard took a step back. Howard’s legs hit the ottoman, and he fell over the ottoman and onto the chair. As Howard tumbled, Wilson fell on top of him. Howard was still holding the knife in his hands, with Wilson’s hands wrapped around his hands. When Wilson landed, he let go of Howard’s hands. Howard had his head on the cushion of the chair, with his body and legs over the ottoman.

At this point McMillian came into the living room. After McMillian helped Wilson stand up, Wilson realized for the first time Howard had been stabbed. That is when Wilson stated, “Oh, he’s bleeding.” When Wilson got up, Howard was still lying on the chair, with his back and legs on the ottoman. Wilson and McMillian left, and Wilson called 911.

The 911 call was played for the jury. Wilson reported in the call that somebody had attempted to stab him, so he “stabbed back.” When the operator asked why the man tried to stab him, Wilson responded, “I don’t have the slightest idea.” When the operator called Wilson back and asked him again why the man tried to stab him, Wilson replied, “I haven’t the slightest idea, ma’am. I am laying on the floor. . . . I still on the floor. He still up on the couch.” He added, “[He] stabbed me so I did it to him.” Wilson stated as to the knife, “I don’t know where he got it from.” At trial Wilson testified he stated on the 911 call he had stabbed Howard because the knife must have gone into Howard for him to

be bleeding. But Wilson did not intend to stab or kill Howard. Rather, he was “always off balance” during the struggle.

Wilson described Howard as “bossy” and “pushy”; Howard tried to be intimidating, but he was too small. Wilson slapped Howard because he was threatening to do something to Wilson’s clothes. Howard “kept walking up to [Wilson] like he was gonna do something.” Wilson was not intimidated because Howard was an “old man” who did not “have it all upstairs” and was a “real little guy.” Wilson slapped Howard across the cheek back-handed with his left hand. Although Wilson is right-handed, he slapped Howard with his left hand, with less than “a quarter-strength,” because Howard was an “itty-bitty little dude.” When Wilson told Detective Bigel he “knocked the shit out of” Howard, it was “just an expression.” He was mistaken when he told Detective Bigel that Howard “was out” for 10 or 15 seconds when, in fact, Howard was only dazed.

Wilson testified about pain he experienced in his knees from injuries he had at the time of Howard’s death. Wilson demonstrated how difficult it was for him to go from lying down to getting up on his knees, then standing, causing his knees to swell. Wilson was six feet and one inch tall and weighed 240 pounds at the time of Howard’s death.

C. *Jury Instructions and Verdict*

The trial court instructed the jury with CALCRIM Nos. 505 (self-defense), 511 (excusable homicide: accident in the heat of passion), 570 (voluntary manslaughter: heat of passion), 520 (second degree murder with malice aforethought), and 580 (involuntary manslaughter). The jury found Wilson guilty of voluntary manslaughter (count 2) and found true the allegation

Wilson personally used a deadly or dangerous weapon (a knife) in the commission of the offense. The jury acquitted Wilson of murder (count 1).³

D. *Motion for a New Trial*

Wilson filed a written motion for a new trial on the basis “the verdict or finding is contrary to law or evidence.” (§ 1181, subd. 6.) In his motion, Wilson articulated the legal standard the trial court must apply in ruling on the motion. Wilson argued, “[T]he trial court is **required** to independently weigh the evidence[.]’ *People v. Serrato* (1973) 9 Cal.3d 753, 761 (emphasis added). ‘The trial court’s duty is to review the evidence independently and satisfy itself that the evidence as a whole is sufficient to sustain the verdict.’ *People v. Dickens* (2005) 130 Cal.App.4th 1245, 1251. This contrasts with the duty of an appellate court which may only set aside a verdict where there is no substantial evidence to support it. *Serrato*, 9 Cal.3d at 761. Moreover, the trial court abuses its discretion where it fails to independently weigh the evidence or defers to the jury’s determination of witness credibility. *People v. Carter* (2014) 227 Cal.App.4th 322, 328.” Wilson also pointed to the trial court’s role in reviewing the evidence “as a 13th juror” who “may rule that the jury’s verdict is contrary to the evidence within the meaning of section 1181, subdivision 6” if the court “is not convinced that the charges have been proved beyond a reasonable doubt.” Wilson also asserted the standard for determining a motion for a new trial “contrasts with the duty of an appellate

³ As part of a negotiated agreement, count 3 for involuntary manslaughter was not submitted to the jury. The count was dismissed at the time of sentencing.

court which may only set aside a verdict where there is no substantial evidence to support it.” Wilson argued he “used proportional force in repelling an unprovoked, malicious attack that may have cost him his life,” and that he “unintentionally and unknowingly caused the death of the victim.” Thus, the jury erred in not finding he acted in self-defense, supporting his motion for a new trial.

After hearing argument, the trial court denied Wilson’s motion, explaining, “There were issues that were properly litigated before the jury, and the jury decided it was not self-defense. And it’s not appropriate for me to substitute my judgment for theirs. The evidence did support a conviction for voluntary manslaughter so the motion is denied.”

E. *The Sentencing*

The trial court sentenced Wilson on count 2 to the low term of three years,⁴ plus a consecutive term of one year for the deadly weapon enhancement (§ 12022, subd. (b)(1)), for a total aggregate sentence of four years. The trial court imposed a \$30 court facilities assessment (Gov. Code, § 70373) and a \$40 court operations assessment (§ 1465.8, subd. (a)(1)). The trial court also imposed a restitution fine of \$390 (§ 1202.4, subd. (b)) and imposed and suspended a parole revocation restitution fine in the

⁴ The abstract of judgment incorrectly states Wilson was convicted of involuntary manslaughter. If the trial court on remand denies the motion for a new trial, it should ensure the abstract of judgment reflects a conviction for voluntary manslaughter.

same amount (§ 1202.45).⁵ The trial court did not state its reasons for imposing the \$390 restitution and parole revocation restitution fines or why it imposed an amount above the \$300 statutory minimum. (§ 1202.4, subd. (b)(1); § 1202.45.) Wilson did not object to imposition of the assessments and fines.

Wilson timely appealed.

DISCUSSION

A. *Wilson Did Not Forfeit His Claim*

The People contend Wilson forfeited his challenge to the trial court's ruling on his motion for a new trial because he did not argue the proper standard at the hearing or object to the trial court's ruling. This argument lacks merit. A defendant preserves a claim for appeal where he or she "properly file[s] a new trial motion and argue[s] the correct legal standard to determine the motion." (*People v. Carter* (2014) 227 Cal.App.4th 322, 327, fn. 2 (*Carter*); accord, *People v. Watts* (2018) 22 Cal.App.5th 102, 113 (*Watts*).)

Wilson cited the correct legal standard in his written motion and secured a ruling from the trial court. There is no requirement, as argued by the People, that Wilson repeat his argument as to the correct legal standard at the hearing. The cases relied on by the People are not to the contrary. (See *People v. Braxton* (2004) 34 Cal.4th 798, 814 (*Braxton*) ["litigants generally are not required, on pain of forfeiting valuable rights,

⁵ The trial court stated it stayed the parole revocation fine, but the abstract of judgment reflects, as provided in the statute, the fine was suspended unless parole is revoked (§ 1202.45, subd. (c)).

to remind trial courts of relevant statutory provisions”]; *People v. Masotti* (2008) 163 Cal.App.4th 504, 508 [defendant must specify grounds for new trial in motion under section 1181]; *In re Riva M.* (1991) 235 Cal.App.3d 403, 412 [father in dependency proceeding waived argument trial court used incorrect standard of proof by not raising it in the trial court].)

B. *The Trial Court Erred When It Failed Independently To Review the Evidence Under Section 1181, Subdivision 6*

1. *Standard of review*

We review the trial court’s denial of a motion for a new trial for an abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 730 (*Fuiava*); *Watts, supra*, 22 Cal.App.5th at p. 115.) The trial court “has broad discretion in ruling on a new trial motion, and the court’s ruling will not be overturned absent a clear and unmistakable abuse of that discretion.” (*Carter, supra*, 227 Cal.App.4th at p. 328; accord, *Fuiava*, at p. 730.) “The court abuses its discretion, however, where it misconceives its duty, applies an incorrect legal standard, or fails to independently consider the weight of the evidence.” (*Carter*, at p. 328; accord, *Watts*, at p. 115 [“an abuse of discretion arises if the trial court based its decision on impermissible factors [citation] or on an incorrect legal standard”].)

2. *Section 1181, subdivision 6, requires the trial court independently to review the evidence*

Section 1181, subdivision 6, provides the trial court may grant a new trial “[w]hen the verdict or finding is contrary to law or evidence.” “The court extends no evidentiary deference in ruling on an 1181(6) motion for new trial. Instead, it

independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a ‘13th juror.’” (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133 (*Porter*); accord, *Watts, supra*, 22 Cal.App.5th at p. 112; *Carter, supra*, 227 Cal.App.4th at p. 327.) “If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury’s verdict is ‘contrary to [the] . . . evidence.’ [Citations.] In doing so, the judge acts as a 13th juror who is a ‘holdout’ for acquittal. Thus, the grant of a section 1181(6) motion is the equivalent of a mistrial caused by a hung jury.” (*Porter*, at p. 133.)

Although a trial court in considering a motion for a new trial must be “guided by a presumption in favor of the correctness of the verdict” (*Fuiava, supra*, 53 Cal.4th at p. 729), “this means only that the court may not *arbitrarily* reject a verdict which is supported by substantial evidence.” (*Watts, supra*, 22 Cal.App.5th at p. 112; accord, *Carter, supra*, 227 Cal.App.4th at p. 328 [“The presumption that the verdict is correct . . . does not affect the court’s duty to apply its independent determination to the probative value of the evidence.”]; *People v. Dickens* (2005) 130 Cal.App.4th 1245, 1252 [same].) The trial court “is not bound by the jury’s determinations as to the credibility of witnesses or as to the weight or effect to be accorded to the evidence. [Citations.] If the court finds that the evidence is not sufficiently probative to sustain the verdict, it must order a new trial.” (*Watts*, at p. 112; accord, *Carter*, at p. 328.)

The trial court’s responsibility in examining the evidence on a motion for a new trial under section 1181, subdivision 6, is different from its role in reviewing the evidence on a section

1118.1 motion for judgment of acquittal, for which “a court does not “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’ [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”” (*Porter, supra*, 47 Cal.4th at p. 132.)

A trial court abuses its discretion in ruling on a motion for a new trial when it does not independently review the evidence, instead deferring to the jury’s evaluation of witness credibility. (*People v. Robarge* (1953) 41 Cal.2d 628, 634 [trial court abused its discretion in denying motion for new trial where it disbelieved much of eyewitness’s testimony, but stated it “was bound by the contrary conclusion of the jury” and the jurors were the sole judges of witness credibility]; *Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 783, 786 [trial court erred in denying motion for new trial based on insufficient evidence where court stated it was “unable to ‘substitute its judgment for that of the jury’”]; *Watts, supra*, 22 Cal.App.5th at pp. 111, 115 [trial court abused its discretion in denying motion for new trial where court did not independently review the evidence, stating “[i]t’s not for me to reweigh the evidence”]; *Carter, supra*, 227 Cal.App.4th at pp. 326, 328 [trial court abused its discretion in denying motion for a new trial where it stated, “I would have weighed the evidence differently,” and the court “would have had a reasonable doubt”]; cf. *Fuiava, supra*, 53 Cal.4th at pp. 729-730 [trial court did not abuse its discretion in denying new trial motion where it found “the evidence of defendant’s guilt was ‘overwhelming’”].)

3. *The trial court improperly deferred to the jury's determination of whether Wilson acted in self-defense instead of independently reviewing the evidence*

Wilson contends the trial court applied the wrong legal standard in ruling on his motion for a new trial by deferring to the jury's determination Wilson did not act in self-defense. We agree. Although the trial court was required independently to examine the evidence, it deferred to the jury's factual findings, stating, "There were issues that were properly litigated before the jury, and the jury decided it was not self-defense. And it's not appropriate for me to substitute my judgment for theirs."

The People rely on the trial court's conclusion "[t]he evidence did support a conviction for voluntary manslaughter" to support their argument the court performed an independent review of the evidence, citing to *People v. Davis* (1995) 10 Cal.4th 463, 524 and *People v. Price* (1992) 4 Cal.App.4th 1272. The People's reliance on *Davis* and *Price* is misplaced. In *Davis*, the Supreme Court affirmed the trial court's denial of a motion for a new trial, in which the court stated as to two counts, "the court feels there was sufficient evidence to support the verdicts," and as to another count, "I think the jury finding of that [is] supported by the evidence." (*Davis*, at p. 523.) However, in affirming the ruling, the Supreme Court noted the trial court "expressly articulated the correct standard of review [and] . . . independently determined the credibility of the witnesses and the probative value of the evidence." (*Id.* at p. 524.) In *Price*, the trial court stated in denying the defendant's motion for a new trial, "I think the evidence was sufficient," and "there was enough evidence there for the jury to do what the jury did" (*Price*, at p. 1275.) The Court of Appeal affirmed, concluding "it

would have been preferable” for the trial court to make clear it was denying the motion based on its independent weighing of the evidence, but “the court’s exercise of its independent judgment is reflected in its statement that the evidence was sufficient.” (*Ibid.*)

Although the courts in both *Davis* and *Price* stated there was sufficient evidence to support the jury’s verdict, in neither case did the trial court, as here, state it was not appropriate for the court to substitute its judgment for that of the jury. The facts here are more analogous to those in *Watts, supra*, 22 Cal.App.5th 102. In *Watts*, the trial court stated as to the defendant’s motion for a new trial on the gang enhancement allegation, “[i]t’s not for me to reweigh the evidence,” and “it’s not for me to second guess the jury.” (*Id.* at p. 111.) After the defendant reiterated the correct standard, the trial court replied, “My job . . . is not to retry the case in my head and do whatever you want me to do because you think the evidence wasn’t sufficient enough for the jury.” (*Ibid.*) However, the court added, “as far as the court is concerned, there was evidence to let the jury decide yes it was a gang case or no it wasn’t.” (*Ibid.*)

The Court of Appeal reversed, finding “the trial court employed the incorrect test when reviewing Watts’s new trial motion, citing the legal standard used when ruling on a section 1118.1 motion rather than a section 1181, subdivision (6) motion.” (*Watts, supra*, 22 Cal.App.5th at p. 113.) Similarly, the statement by the trial court here that “[t]he evidence did support a conviction for voluntary manslaughter” reflects the standard for a motion for acquittal under section 1118.1, of whether the evidence “is insufficient to sustain a conviction of such offense or

offenses on appeal,” not the trial court’s independent review of the evidence.

It was important for the trial court in this case independently to weigh the evidence and assess witness credibility because the determination whether Wilson acted in self-defense depended largely on witness credibility and evaluation of inconsistencies in the evidence. Wilson’s account of the stabbing differed from that of McMillian in critical respects, and there were inconsistencies between Wilson’s testimony and his recorded interview with Detective Bigel, as well as with his 911 call.

Wilson described the struggle as beginning when Howard approached him from behind, holding a knife over Wilson’s head, as Wilson was lying on the floor. Wilson grabbed Howard’s hands with his hands, then got up onto his knees as the two struggled and moved around the room. At this point Wilson turned the knife toward Howard to scare him. As Wilson tried to stand up, Howard took a step backwards and fell over the ottoman, with Wilson falling on top of him. Howard was lying with his head on the chair cushion, and his body and legs over the ottoman. This is when McMillian came into the room.

According to McMillian, when he walked into the living room, Howard was slumped down on the chair with Wilson on top of him, in contrast to Wilson’s description that Howard had his body and legs on the ottoman. McMillian testified the ottoman was pushed away from the chair. Further, in contrast to Wilson’s description, McMillian testified Wilson had both his hands on Howard’s collarbones and was pushing him forward.

There were also inconsistencies between Wilson’s account of the stabbing he provided to Detective Bigel and his testimony

at trial. Wilson told Detective Bigel he was standing when Howard fell backwards onto the chair with Wilson on top of him, but at trial he testified he was on his knees just getting up. Also, Wilson did not tell Detective Bigel he was scared, but testified at trial he was “completely scared” when Howard came at him with a knife. Wilson also told Detective Bigel that he had “slapped the shit out of” Howard the week before Howard’s death and Howard was “out” for 10 or 15 seconds. But at trial Wilson testified he slapped Howard with only “a quarter-strength,” causing Howard to be only dazed. In addition, although Wilson told the 911 operator that when Howard tried to stab him, Wilson “stabbed back,” but Wilson testified he only learned Howard was stabbed after McMillian pulled him off Howard.

Although the trial court could have found this evidence supported Wilson’s conviction for voluntary manslaughter, it was for the trial court in the first instance to assess the credibility of Wilson and McMillian and to evaluate the evidence; the trial court erred by instead deferring to the jury’s determination. (*Robarge, supra*, 41 Cal.2d at p. 634; *Watts, supra*, 22 Cal.App.5th at pp. 111, 115.)

4. *The trial court must rehear Wilson’s motion for a new trial*

The People contend we should affirm the trial court’s denial of Wilson’s motion for a new trial because any trial court error was harmless, relying on *Braxton, supra*, 34 Cal.4th at p. 805. The People’s reliance on *Braxton* is misplaced. Article VI, section 13 of the California Constitution provides that a trial court’s judgment cannot be set aside unless “after an examination of the entire cause, including the evidence, the court shall be of the

opinion that the error complained of has resulted in a miscarriage of justice.” (See *Braxton*, at p. 805 [“reviewing court may order a new trial under section 1202 only if the trial court’s failure to hear the defendant’s new trial motion has resulted in a miscarriage of justice”].)⁶

However, as the *Braxton* court explained, “In some cases, a trial court’s refusal to hear a new trial motion will result in a record from which a reviewing court will be unable to determine with sufficient certainty whether the new trial motion was meritorious.” (*Braxton, supra*, 34 Cal.4th at p. 818.) In those cases, “the reviewing court may remand the matter to the trial court for a belated hearing of the new trial motion, absent a showing that a fair hearing of the motion is no longer possible.” (*Id.* at p. 819; see *Robarge, supra*, 41 Cal.2d at p. 634 [vacating trial court order denying motion for new trial and remanding for trial court to rehear the motion where “the trial court failed to give defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict”]; *Watts, supra*, 22 Cal.App.5th at p. 115 [vacating judgment and order denying motion for a new trial and remanding for rehearing where trial court did not provide defendant “the benefit of its independent assessment regarding the sufficiency of credible evidence to support the verdicts”]; *Carter, supra*, 227 Cal.App.4th at p. 324 [vacating trial court’s order denying motion for new trial

⁶ As the *Braxton* court explained, section 1202 “entitles a defendant to a new trial when the trial court has refused to hear or neglected to determine a defendant’s motion for a new trial and a reviewing court has properly determined that the defendant suffered actual prejudice as a result.” (*Braxton, supra*, 34 Cal.4th at p. 817.)

and ordering new trial where record made clear trial court would have granted a new trial under the correct standard].)

Here, the appellate record is insufficient for us “to determine with sufficient certainty whether the new trial motion was meritorious.” (*Braxton, supra*, 34 Cal.4th at pp. 818-819.) As discussed, whether the People met their burden to prove Wilson did not act in self-defense turns on a determination of witness credibility and a weighing of the evidence, which the trial court must address in the first instance.

C. *Wilson Is Entitled to a Hearing on His Ability To Pay the Fines and Assessments*

Wilson requests we remand the case for the trial court to conduct an ability to pay hearing in accordance with our opinion in *Dueñas, supra*, 30 Cal.App.5th 1157, because Wilson was unemployed and homeless at the time of the offense, and was temporarily residing on the floor of McMillian’s living room. We agree Wilson should have an opportunity on remand to request a hearing and present evidence demonstrating his inability to pay the fines and assessments imposed by the trial court.

As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485, 488-489 (*Castellano*), “In *Dueñas, supra*, 30 Cal.App.5th 1157 this court held it violated due process under both the United States and California Constitutions to impose a court operations assessment as required by Penal Code section 1465.8 or the court facilities assessment mandated by Government Code section 70373, neither of which is intended to be punitive in nature, without first determining the convicted defendant’s ability to pay. (*Dueñas*, at p. 1168.) A restitution fine under Penal Code section 1202.4, subdivision (b), in contrast,

is intended to be, and is recognized as, additional punishment for a crime. Penal Code section 1202.4, subdivision (c), provides a defendant's inability to pay may not be considered a compelling and extraordinary reason not to impose the restitution fine; inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. To avoid the serious constitutional question raised by these provisions, we held, although the trial court is required to impose a restitution fine, the court must stay execution of the fine until it is determined the defendant has the ability to pay the fine. (*Dueñas*, at p. 1172.)”

1. *We decline to find forfeiture of Wilson's arguments under Dueñas*

The People contend in their supplemental briefing Wilson forfeited his objections to the trial court's imposition of the fines and assessments because he failed to object to their imposition at sentencing. However, at the time Wilson was sentenced, *Dueñas* had not yet been decided. As we explained in *Castellano* in rejecting this argument, “[N]o California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. . . . When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture.” (*Castellano*, *supra*, 33 Cal.App.5th at p. 489.) As in *Castellano*, we decline to find Wilson forfeited his constitutional challenge as to the \$30 court facilities assessment and \$40 court operations assessment.

The People contend, however, that at the time of sentencing, Wilson had a right under section 1202.4, subdivision (d), to challenge imposition of a restitution fine above the \$300 statutory minimum, and the parole revocation restitution fine in the same amount (§ 1202.45, subd. (a)), and therefore we should not remand for an ability to pay hearing as to this fine.⁷ “However, neither forfeiture nor application of the forfeiture rule is automatic.” (*People v. McCullough* (2013) 56 Cal.4th 589, 593 [finding defendant forfeited challenge to imposition of booking fee where he failed to raise his ability to pay the fee in the trial court]; accord, *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [“application of the forfeiture rule is not automatic,” although . . . the appellate court’s discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue”].)

Although the People are correct Wilson could have challenged the trial court’s imposition of the restitution and parole revocation restitution fines to the extent the fines were above the statutory minimum of \$300, we decline to find forfeiture because an ability to challenge imposition of an additional \$90 in fines is different from the ability to challenge a \$390 fine. Had Wilson known he had a due process right to challenge the entire \$390 restitution fine, he may well have requested a hearing and submitted the necessary documentation to show his inability to pay the restitution fine and parole

⁷ Although the People assert this argument to support their claim there was no constitutional violation, we treat the People’s position as an argument Wilson forfeited his challenge to imposition of the restitution fines by not raising his ability to pay below.

revocation restitution fine. Moreover, the purpose of the forfeiture rule “is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.” (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) Because we are directing the trial court to hold an ability to pay hearing on remand as to the \$30 and \$40 assessments, it is appropriate for Wilson to make a record on remand as to his ability to pay all the fines and assessments.

2. *On remand Wilson is entitled to an opportunity to challenge imposition of the fines and assessments*

The People contend the record does not support a remand for an ability to pay hearing because Wilson failed to show in the trial court he did not have the financial ability to pay the fines and assessments, and failed to show he lacked the future earning capacity to pay, including from wages he would earn while in prison. The People also point out Wilson was 52 years old at the time of the offense and had previously been employed as a forklift operator, a mechanic, and a laborer.

The People are correct Wilson must in the first instance request an ability to pay hearing and present evidence of his inability to pay the fines and assessments. As we explained in *Castellano*, “[c]onsistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court.” (*Castellano*, *supra*, 33 Cal.App.5th at p. 490.) However, as discussed in the context of forfeiture, because Wilson was not aware of his ability to challenge the fines and assessments on due process and equal

protection grounds, we conclude he should have that opportunity on remand.

We reject the People's additional contention that Wilson has not shown a due process violation because he has not demonstrated adverse consequences from imposition of the fines and assessments. As we explained in *Castellano*, "the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*Castellano, supra*, 33 Cal.App.5th at p. 490.)

DISPOSITION

We reverse the trial court's order denying Wilson's motion for a new trial and remand for the trial court to conduct a rehearing on the motion. If the trial court grants the motion, Wilson will be entitled to a new trial. If the trial court denies the motion, the trial court should again pronounce judgment against Wilson and afford him an opportunity to request a hearing and present evidence at a hearing of his ability to pay the fines and assessments imposed at sentencing.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.